

**FAIR EMPLOYMENT & HOUSING COMMISSION**

455 GOLDEN GATE AVENUE, SUITE 10600  
SAN FRANCISCO, CA 94102  
(415) 557-2325 FACSIMILE (415) 557-0855  
[www.fehc.ca.gov](http://www.fehc.ca.gov)



## MINUTES 470<sup>th</sup> COMMISSION MEETING

September 18, 2007  
United States Federal Building  
450 Golden Gate Avenue, Nineteenth Floor, Courtroom 12  
San Francisco, California

***PRESENT:***

Chairman George Woolverton, Vice-Chair Tamiza Hockenhull, Commissioners Patrick Adams, Carol Freeman and Linda Ng; and Commission staff Ann Noel, Caroline Hunt, Regina Brown, Joseph Ragazzo, Denise Choye, Cynthia Jones and Loc D. Tra; Senior Assistant Attorney General Louis Verdugo Jr.; Department of Fair Employment and Housing (Department or DFEH) Acting Director Wanda Kirby and DFEH staff Chila Silva-Martin; State and Consumer Services (SCSA or Agency) General Counsel Leslie Lopez; SCSA Chief Deputy Secretary Scott Harvey; and Agency staff Elmy Bermejo and Luis Farias; Office of Administrative Hearings (OAH) Director Ron Diedrich; and OAH Sacramento Presiding Administrative Law Judge Jonathon Lew; Governor's Office staff Hong Cheng; Legislative Offices representatives; and members of the public.

Chairman Woolverton moved, Vice-Chair Hockenhull seconded, and the Commission voted 5:0 to call the meeting to order at 10:03 a.m. [07-24]

***OPEN SESSION*****REVIEW OF AGENDA**

The Commission accepted the agenda with no changes.

**REVIEW OF THE MINUTES**

Chairman Woolverton moved, Vice-Chair Hockenhull seconded, and the Commission voted 5:0 to adopt the Minutes and Transactions of the 469<sup>th</sup> meeting as submitted. [07-25]

***CLOSED SESSION***

The Commission entered Closed Session at 10:05 a.m. Only the Commissioners, Commission staff, and Attorney General staff were present.

The Commission discussed writs, hearings and litigation and deliberated on pending cases.

a. Writs and Appeals

(1) DFEH v. San Francisco BART (Bartley)

ELAS Noel reported that oral argument on S.F. BART's Petition for Writ of Mandate will be heard by the Alameda Superior Court at 9 a.m. on October 4, 2007.

(2) DFEH v. Prunty's New Beginnings (Project Sentinel/Jensen)

ELAS Noel reported that the Commission expected that it would soon be served by complainant, Project Sentinel, with a Writ of Administrative Mandamus appealing the Commission's Order of Attorney's fees.

(3) DFEH v. Sasco Electric (Scherl)

ALJ Hunt reported that the Commission expected respondent Sasco Electric to file a Petition for Writ of Mandate in this case.

b. Post-Decision

The Commission monitors the status of enforcement of its decisions to ensure its orders are enforced and monetary awards are paid. ELAS Noel noted that there is no new information about the following four post-decisions and several are going to be difficult to enforce due to the following:

(1) DFEH v. CATERON, et al (Benjamin)

The respondent is currently incarcerated.

(2) DFEH v. Capitol Hills AM/PM (Johnson)

The respondents have moved to Israel.

(3) DFEH v. San Diego City Event (Handevitd)

The respondent is in bankruptcy.

(4) DFEH v. Harry Mayo (Young)

ALJ Hunt reported that respondent's former attorney has notified the Commission that he has instructed his former client to comply in full with the Commission's order.

c. Administrative Adjudication: Pending Decisions, Hearings Completed – 100 days for FEHC to act in **[bold]**

At 10:10 a.m. ALJ Brown left the room and ALJ Ragazzo presented the following case.

(1) DFEH v. Sacramento Unified School District (Funaroff) **[10/7/07]**

Commission Adams moved, Vice-Chair Hockenhull seconded, and the Commission voted 5:0 to issue a Notice of Further Argument (NOFA) and to request further evidence in this case. [07-26]

At 10:35 a.m. ALJ Brown rejoined the meeting.

At 10:50 a.m. ALJ Hunt left the room and ALJ Brown presented the following case.

(2) DFEH v. Fulkerson (Hartunian) **[10/17/07]**

Chairman Woolverton moved, Commissioner Adams seconded, and the Commission voted 5:0 to adopt and to make the proposed decision precedential. [07-27]

At 10:57 a.m. ALJ Ragazzo left the room and ALJ Hunt rejoined the meeting to present the following case.

(3) DFEH v. Advanced Medical Solutions (Zapfen) **[11/7/07]**

Chairman Woolverton moved, Commissioner Adams seconded, and the Commission voted 5:0 to adopt the proposed decision. [07-28]

At 11:07 a.m. ALJ Ragazzo rejoined the meeting.

d. Personnel

At the direction of Chairman Woolverton, all Commission staff and Attorney General staff left the room.

Chairman Woolverton and the other Commissioners met on this item. Closed Session ended at 11:15 a.m.

***OPEN SESSION***

At 11:25 a.m., the Commission entered Open Session and Chairman Woolverton announced that the Commission would be removing items 12 and 13, scheduled for 1:30 p.m., from the Agenda.

### **COMMISSIONERS' REPORTS**

Chairman Woolverton reported that he has been speaking about disability discrimination and workers' compensation law at multiple venues throughout the California including to the County of Alameda's Risk Management group with ELAS Noel.

### **EXECUTIVE AND LEGAL AFFAIRS SECRETARY'S (ELAS) ACTIVITY REPORT**

ELAS Noel discussed the following items from her Report:

**Commissioner Appointments:** Three Commissioners' terms ended September 18, 2007: former Vice-Chair Herschel Rosenthal and Commissioners Patrick Adams and Linda Ng. In addition, there is one existing vacancy on the Commission. Both Commissioners Adams and Ng are seeking reappointment.

**2008-09 Budgets:** Due to less revenue than anticipated, this fiscal year General Fund agencies were required to absorb a budget reduction; the Commission's portion was \$6000. On September 4, 2007, the Department of Finance issued a Budget Letter (07-25) which informs General Fund agencies that they also will absorb any price increases for Fiscal Year 2007-08 for rent and other services. There may be additional reductions during this fiscal year if projected State revenues are not met. Department of Finance will work with Agency to determine the appropriate dollar amounts for each department/commission, if any.

For the 2008-09 budget, Commission staff has requested two budget change proposals: one for training for Commission staff (\$10,000) and one for increased IT support for web conferencing and other IT needs (\$7,000). Web conferencing is a priority of Governor Schwarzenegger and with the proper equipment and training, staff anticipates that the Commission could hold some of its meetings with Commissioners at multiple locations. To date, we have no feedback from Agency regarding these BCPs. Note, however, that the state anticipates a \$6 billion dollar shortfall next year in revenues versus expenditures so spending priorities will be constrained.

**Adjudication and Settlement Conferences:** Since January 2007 through August 27, 2007, the Department has issued 66 accusations. The Commission ALJs presided in 11 hearings (with 30 hearing days), conducted 5 settlement conferences, and conducted 25 case management conferences, including pre-hearing conferences, status conferences and discovery hearings. A copy of the Commission's September 2007 hearing calendar was given to the Commissioners to give them an idea of the Commission's typical hearing activity for a month.

**AB 1825, Ethics & Open Meeting Act Training:** 2007 is a "training year" for AB 1825 sexual harassment training for several Commissioners. In addition, this year most Commissioners and staff are required to complete their biennial ethics training. Furthermore, staff

suggests that it conduct training again soon about the provisions of the Bagley-Keene Act, which governs open meeting requirements. Staff proposes giving sexual harassment prevention and Bagley-Keene Act training at the next Commission meeting on November 5, 2007. In addition, staff will be sending email reminders to the Commissioners who are required to complete online ethics training this year. This course is offered by the state's Department of Justice and is available online or in a video format.

**Outreach and Public Speaking:** On behalf of the Commission, Commission staff has continued to speak at multiple venues regarding the Commission's sexual harassment training regulations, including presentations for the Employers' Group in Los Angeles, the Central Coast Human Resources Association in Monterey, and a number of San Francisco-based webinars. Staff has prepared a Power Point presentation of the Commission's sexual harassment training regulations and is hoping to use it as the basis for a future FEHC-sponsored webinar that the Commission can archive on the Commission's website so that it is readily accessible to the public. SCSA IT staff will be working with the Commission on this project.

On August 8, 2007, Chairman Woolverton and ELAS Noel spoke to the County of Alameda's Risk Management group about the intersection of disability discrimination and workers' compensation law. Chairman Woolverton and staff are working together on a Power Point presentation to reflect recent changes in California disability decisional law and propose using this as the basis of a FEHC-sponsored seminar on FEHA disability law.

On August 15, 2007, Yale Law Professor William Eskridge, Jr. and his Harvard Law School research assistant Kevin Schwartz visited Commission staff to discuss California's part in the development of laws and regulations granting female employees the right to pregnancy disability leave and protecting against discrimination on the basis of pregnancy. Professor Eskridge and Schwartz are writing a book on the historical development of pregnancy disability leave laws and protections against pregnancy discrimination in the United States and will highlight the pivotal role California has played in this history.

Professor Eskridge was particularly interested in the Commission's legal strategy to defend the FEHA's pregnancy disability leave (PDL) provisions (now at Gov. Code section 12945, subd.(a)) in the seminal case, *California Federal Savings & Loan v. Guerra* (1987) 479 U.S. 272. In *Cal Fed*, the United States Supreme Court decision upheld FEHA's pregnancy leave protections and the Commission's regulations interpreting that law, even though the effect of this was to give women disabled by pregnancy potentially a longer leave than that provided by employers to their non-pregnancy-disabled employees. In the Commission's archives is a rich trove of documents on PDL legislation, rulemaking, litigation, news articles and Commission decisions which staff shared with Eskridge and Schwarz.

**News Articles:** Several news articles about the Commission's sexual harassment training regulations were given to the Commissioners.

Commission Adams requested from staff a breakdown of where the Commission cases are as they move through in the litigation pipeline. And adding onto this request, Vice-Chair Hockenhull requested from staff a count of the accusations the Commission receives from DFEH.

Chairman Woolverton announced that since former Vice-Chair Rosenthal's term ended on September 18, 2007, Commissioner Hockenhull will now be Vice-Chair and no longer Acting Vice-Chair.

### **PROPOSED HEARING ON HATE CRIMES IN NORTHERN CALIFORNIA**

ALJ Brown reported on and discussed numerous news articles documenting a disturbing number of hate violence incidents in Northern California this year:

ALJ Brown also noted that the Commission, as the state's civil rights agency, has served in the past as a forum to discuss constructive ways to address increases in hate violence, holding hearings in Richmond, San Diego, Contra Costa County and Southern Alameda County. Out of these hearings, the Commission has issued findings and recommendations on the incidents and has developed an expertise and leadership role on effective responses to hate violence. For example, Commission staff worked to create the first curriculum for police on investigating hate violence incidents, created a manual for attorneys to represent victims of hate violence, and has provided training to police, district attorneys, private civil attorneys, and members of the public.

Commission staff suggested that Commission holds hearings on these incidents and ascertain if there are any steps that that state can or should take to address these incidents. Chairman Woolverton suggested that this matter should be on November meeting's agenda to be discussed further.

### **LEGISLATION**

ALJ Ragazzo referred the Commission to his legislative report for information about current legislative bills tracked by the Commission throughout the year, ten of which have passed. ALJ Ragazzo discussed the status of several bills the Commission has tracked. He informed the Commission that A.B. 43 (Leno), on gender-neutral marriage, was vetoed the Governor and S.B. 727, S.B. 777 and S.B. 836 (Kuehl) have passed the Legislature and are on the Governor's desk. S.B. 836, which would prohibit employment discrimination against any person caring for a family member, would expand employment discrimination protection under the FEHA.

Throughout the year, the FEHC's Legislative Committee (Commissioners Ng and Adams and ALJ Ragazzo) has been discussing specific legislative proposals and ideas for the upcoming legislative session and hope to meet soon to further explore legislative ideas.

### **50<sup>th</sup> ANNIVERSARY**

ELAS Noel stated that the Labor and Employment Section of the State Bar is going to make the theme of their 2009 program the 50<sup>th</sup> anniversary of Fair Employment and Housing Act (FEHA). The Commission will be coordinating with them for ideas for the program.

ELAS Noel noted that DFEH Acting Director Wanda Kirby drafted a comprehensive history of the FEHA for the 40<sup>th</sup> anniversary of the FEHA and that this history will be the starting

point for any 50<sup>th</sup> anniversary FEHA history created. Acting Director Kirby had agreed to work on the document with Noel.

### **REGULATIONS**

ELAS Noel stated that now that the Commission has successfully completed the Commission's Sexual Harassment Training regulations, the Commission is ready to start on other regulatory projects. Chairman Woolverton suggested that the Commission should focus on new disability regulations as well as revised pregnancy disability leave regulations. ELAS Noel suggested the Commission recruit a Working Group of plaintiffs and defense counsel to work with it on the disability regulations. The Commission agreed to begin work on both sets of regulations.

### **DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING'S REPORT**

DFEH Acting Director Wanda Kirby reported on recent activities at the Department.

Last fiscal year, the Department of Housing and Urban Development (HUD) awarded the DFEH a "HUD Partnership Initiative Grant" of \$1.4 million. With this funding, the DFEH created a third Housing Unit on a limited-term basis at its headquarters in Elk Grove and staffed it. The other two housing units are located in Oakland and Los Angeles.

The Department's 2007-08 Budget Change Proposal was approved by the Legislature. This has allowed the Department to hire more staff.

The Department has a "work share agreement" with The Equal Employment Opportunity Commission (EEOC) with goals set by EEOC for the Department on how many cases per year it must process. DFEH expects to meet its goal this year resulting in \$2.5 million in revenue for the Department.

The Department continues to move forward with its online intake appointment and right-to-sue process systems. Both systems are now in the final testing phase. The Department is hoping to post these new systems on its website in the next few weeks. Once these systems are working, a Spanish version will be implemented.

The Southern California Employment Round Table (SCERT), affiliated with the Department, is planning its annual Fall Conference for November 14, 2007, in Los Angeles. At the conference, a Carol Schiller award will be handed out to an individual who has done extraordinary work in furthering civil rights. This year's recipient will be Dolores Huerta.

The Department is close to releasing its Case Analysis Manual.

**ATTORNEY GENERAL'S REPORT**

Senior Assistant Attorney General Louis Verdugo, Jr. reported on three cases from the Civil Rights Enforcement Section of the Attorney General's office.

The Attorney General's (AG) office has recently reached a settlement agreement with Kern County, as it did earlier in the year with Santa Cruz County to make their polling sites accessible for persons with disabilities. These two counties have agreed to a timetable to bring all of their polling sites into compliance with state and federal access laws. The counties have also agreed to provide training, spend up to \$25,000 a year on site selection training, and up to \$80,000 a year on consultants who will assist them in compliance to the settlement agreement terms.

In the second case, the AG's office is representing DFEH on appeal. The Department filed a complaint alleging that a landlord of a rent-controlled apartment had discriminated against one of its tenants by failing to extend her tenancy for one year as a reasonable accommodation for her disability. In response, the landlord filed a "SLAPP" motion, an acronym for a "strategic lawsuit against political participation," claiming the Department filed the housing complaint to infringe on the landlord's First Amendment rights to proceed under the Ellis Act. The Trial Court denied the motion and the landlord appealed. In a published opinion, the Court of Appeal affirmed the Trial Court's ruling that the Department's lawsuit was motivated by the alleged discrimination and not by the exercise of the landlord's First Amendment rights. SLAPP motions have been used as a defense by landlords in these types of rent-controlled cases and thus it is good that this particular decision was published.

Finally, in the third case, on September 14, 2007, the AG's office simultaneously filed a civil complaint and a stipulation to settle the case against Home Improvement King. The proposed judgment enjoins this home improvement services company from screening out potential customers on the basis of race, ethnicity, national origin, or any other basis protected by the Unruh Civil Rights Act and requires the defendant to pay \$50,000 in civil penalties, \$50,000 in attorney's fees, and \$30,000 in expert fees. The AG's investigation revealed that the defendant noted in its electronic database a customer's race, ethnicity and national origin. These customers were then flagged and given low priority of service. The proposed judgment requires the defendant to implement a comprehensive employees training program and to provide the AG with copies of its customer tracking system for monitoring purposes. The Court has set a hearing to approve the settlement on October 5, 2007. This was a long and complicated investigation in which the AG had to retain experts, seized computer hard-drives, discovered and deciphered the database. In the end, the AG was able to reach a settlement with this Southern California kitchen remodeling company.

Vice-Chair Hockenhull moved, Commissioner Ng seconded, and the Commission voted 4:0 to end Open Session and took a lunch recess at 12:12 p.m. [07-29]

Chairman Woolverton left the meeting at 1:15 p.m.

The Commission reconvened Open Session and entered into a Public Comments portion of the Agenda at 1:18 p.m.



Vice-Chair Hockenhull moved, Commissioner Adams seconded, and the Commission voted 4:0 [07- 30] to remove items 12 and 13 from the Agenda and requested the Attorney General's office opinion as to the legality of item number 12.

Items 12 and 13 were:

12. State and Consumer Services Agency (SCSA) proposal that Commission enter into an interagency agreement with the Office of Administrative Hearings (OAH) for OAH to conduct administrative hearings and related proceedings in all future FEHC cases.
13. State and Consumer Services Agency proposal that the Commission move its principal office to Sacramento

Vice-Chair Hockenhull asked if anyone had a question for the Commission. Senior Assistant Attorney General Verdugo asked the Commission how the question to the Attorney General's Opinion Unit should be framed and then stated that it was something that could be developed with Commission staff. Once the question is properly worded, it would then be submitted to the Attorney General's Opinion Unit.

### **PUBLIC COMMENTS**

Commission staff presented the Commission with written public comments, which the Commission had received in the past few days regarding agenda items 12 and 13. They were letters from: former Commission Chairman Osias Goren; former Commissioner, the Honorable Milan Smith, Jr., Judge for the Ninth Circuit Court of Appeals; former Commissioner Susan Rose; the California Coalition for Civil Rights; Fair Housing of Napa Valley; the National Fair Housing Alliance; Asian Law Caucus; Asian Americans for Civil Rights; and Golden Gate University's Employment Rights Unit.

Thereafter, the Commission invited the members of the public present to speak, comment or express their concerns.

The Commission heard public comments from a number of speakers.

Speaking against transferring the Commission's adjudicatory functions to the Office of Administrative Hearings:

Wanda Remmers, Executive Director, Housing Rights Incorporated & California Coalition for Civil Rights  
Jerry Scribner, Esq., CASE, California Attorneys, Administrative Law Judges and Hearing Officers in State Employment  
Michele Magar, Esq., Magar & Milstein, fair housing attorney  
Evan White, Fair Housing Coordinator, Project Sentinel  
William Terheyden, Esq., Littler Mendelson

Brian Wallace, “State Employee and Mom and Pop Landlord”  
Valerie Tulier, Aide for State Senator Carole Migden  
Lewis Dolinsky, “Voter and Taxpayer”  
Brag Seligman, Esq., Director, The Impact Fund  
Kevin Baker, Esq., Aide for the Assembly Judiciary Committee  
Jennifer Richard, Legislative Director, State Senator Sheila Kuehl  
Deanne Stone, “Concerned Citizen”  
Judith Moore, “Taxpayer and Voter”

Speaking in favor of transferring the Commission’s adjudicatory functions to the Office of Administrative Hearings:

Michael J. McDermott, Esq., “Men’s Civil Rights Advocate”

A summary of the public comments of the above speakers is available at the Commission’s office, upon request.

The Commission thanked members of the public present for attending and for their interest and comments.

Commissioner Adams commented that people often confused the Department of Fair Employment and Housing (Department or DFEH) with the Fair Employment and Housing Commission (Commission or FEHC). For the benefit of the public, he clarified and differentiated the difference in staff, structure and functions between the two.

Commissioner Adams invited Commission staff to comment.

ALJ Brown commented that she conducted an informal survey of all 50 states’ process of handling adjudication in cases involving housing and employment discrimination. Out of 50 states, 47 have state laws that are similar to the Fair Employment and Housing Act (FEHA) that enforce anti-discrimination laws. Thirty-four out of 47 have their cases heard through either their own commissioners or ALJ hearing officers, or directly go to civil action. Only eight out of 47 states have general jurisdiction ALJs hear their cases and four out of those eight have determined that ALJs must have specialization.

ELAS Noel, at the request of the Commission, discussed the Commission’s functions, workloads, and some of the precedential decisions issued in the past few years. ALJ Hunt gave more information about the ALJs’ caseloads.

ALJ Ragazzo encouraged the Commission to treat this issue as it would any employment dispute before it, hearing all arguments and listening to all parties before making its decision.

Vice-Chair Hockenhull moved, Commissioner Adams seconded, and the Commission voted 4:0 to end Open Session at 2:17 p.m. [07-31]

**ADJOURNMENT**

The Commission adjourned its meeting and the forum at 2:17 p.m.

Date: September 18, 2007

GEORGE WOOLVERTON  
Chairman

ANN M. NOEL  
Executive and Legal Affairs Secretary

**REPORT OF TRANSACTIONS  
OF THE 470th COMMISSION MEETING  
September 18, 2007  
San Francisco, California**

THE COMMISSION AT THIS MEETING TOOK THE FOLLOWING ACTIONS:

- 07-24           Voted 5:0 calling the meeting to order.
- 07-25           Voted 5:0 to approve the Minutes and Transactions of the 469<sup>th</sup> meeting.
- 07-26           Voted 5:0 to issue a Notice of Further Argument and a request for further evidence in DFEH v. Sacramento Unified School District (Funaroff).
- 07-27           Voted 5:0 to adopt and make the proposed decision precedential in DFEH v. Fulkerson (Hartunian).
- 07-28           Voted 5:0 to adopt the proposed decision in DFEH v. Advanced Medical Solutions (Zapien).
- 07-29           Voted 4:0 to end Open Session and took a lunch recess.
- 07-30           Voted 4:0 to remove the items 12 and 13 from the Agenda and voted to request the Attorney General's Opinion Unit for an opinion about the legality of item 12.
- 07-31           Voted 4:0 ending Open Session and adjourning the meeting.

Prepared By

Loc D. Tra  
Clerk of the Commission